

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF VETERANS AFFAIRS

Robert J. Imdieke, Jr.,

v.

Minneapolis Public Schools

and

James Ziebell,

v.

Minneapolis Public Schools

**THIRD PREHEARING ORDER  
ON MOTIONS FOR  
SUMMARY DISPOSITION**

The above-entitled matter came before Administrative Law Judge Eric L. Lipman upon the motions for summary disposition of the Respondent Minneapolis Public Schools ("the District").

Following the receipt of filings on these motions in accordance with the First and Second Prehearing Orders, oral argument on the motions was held on September 2, 2009. Moreover, by way of a letter dated September 14, 2009, Petitioners Imdieke and Ziebell moved to supplement the record with an additional exhibit.

JaPaul Harris, Senior Employee Relations Associate, appeared on behalf of the District. Gayle Gaumer, Wilson Law Firm, appeared on behalf of Petitioners Robert J. Imdieke, Jr. and James Ziebell.

Based upon all of the files, records, and proceedings herein, and for the reasons set forth in the accompanying Memorandum,

**IT IS HEREBY ORDERED THAT:**

1. The Petitioners' Motion to Supplement the Record is GRANTED.
2. The District's Motions for Summary Disposition are DENIED.

3. Within 10 business days of this Order the parties shall confer on appropriate dates for the following events: (a) the close of discovery; (b) the pre-filing of exhibits and witness lists; (c) receipt of any foundation objections under Minn. R. 1400.6950, subdivision 2; and (d) an evidentiary hearing.
4. Within 10 business days of this Order the parties shall individually, or jointly, submit their respective views on the matters in Paragraph 3.

Dated: October 2, 2009

\_\_\_\_s/Eric L. Lipman\_\_\_\_\_  
ERIC L. LIPMAN  
Administrative Law Judge

### **FACTUAL BACKGROUND**

Petitioners were employed by the District in the classification of “electrician” on June 21, 2004. Until their separation from service in 2009, both men performed duties as electricians for the Facilities Department.<sup>1</sup>

Both men were members of the International Brotherhood of Electrical Workers, Local 292, and were hired by the District through the Union’s hiring hall. It is the District practice to fill vacant positions in the building and construction trades by contacting trade union hiring halls. The trade unions maintain lists of union members who are seeking employment.<sup>2</sup>

For this Fiscal Year, 2009—2010, the District projected a \$28 million dollar budget shortfall. As part of its plan to reduce the projected deficit, the District ordered a \$10 million dollar reduction in operational expenses. The District directed all departments, including the Facilities Department, to reduce their operating budgets. Specifically, the Facilities Department was tasked with cutting its operating budget from \$16.3 million dollars to \$12 million dollars.<sup>3</sup>

To meet this directive, the Facilities Department eliminated a total of 29 positions, 26 of which were occasioned by layoff. In particular, the electrician workforce was reduced through layoffs from 22 employees to 13 employees. Under its layoff plan, the District retained its most senior employees in each work classification effected by layoffs, reducing by layoff those workers with less seniority. Additionally, both veterans

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<sup>1</sup> *First Affidavit of Grant Lindberg*, at ¶ 3 (July 30, 2009); *Second Affidavit of Grant Lindberg*, at ¶ 3 (August 20, 2009).

<sup>2</sup> *First Affidavit of Grant Lindberg*, at ¶¶ 7-8; *Second Affidavit of Grant Lindberg*, at ¶ 7.

<sup>3</sup> *First Affidavit of Grant Lindberg*, at ¶¶ 9-18.

and non-veterans were among those persons laid off; and likewise were among the more senior electricians that were retained.<sup>4</sup>

Petitioners were employed by the District from June 21, 2004 until they were separated from employment on June 1, 2009.<sup>5</sup>

On June 1, 2009 the District hand delivered to Petitioners a separation notice. This notice provided in part:

If you are an honorably discharged veteran, you may have certain rights relating to your layoff under the Minnesota Veterans' Preference Act, Minn. Stat. 197.46 ("Act"). Pursuant to the Act, you have the right to petition the District Court for a writ of mandamus, requiring reinstatement and back pay, if you think that your layoff was not in good faith. Alternatively, you have the right to petition the Commissioner of Veterans' Affairs pursuant to Minn. Stat. § 197.48 1 for a hearing to determine whether your layoff was in good faith. If you choose to take either of these actions, you must do so within sixty (60) days of receipt of this notice. Failure to timely request a hearing within this sixty (60) day period shall constitute a waiver of your rights to contest your layoff under the Veteran' Preference Act. Such failure shall also waive all other available legal remedies for reinstatement.<sup>6</sup>

The District continued to pay Petitioners their regular salaries for a period of 60 days following the delivery of the separation notices.<sup>7</sup>

Petitioners timely appealed their respective discharges from employment with the Department of Veterans Affairs.

Following the Department's issuance of Notices of Petition and Orders for Hearing in the respective cases, the matters were combined into a consolidated proceeding.<sup>8</sup>

In opposition to the District's Motion for Summary Disposition, Mr. Imdieke interposed an affidavit which avers in part:

It is common knowledge at the union hall of Local 292 that the same week I was laid off the school district tried to rehire four of the electricians it had just laid off but was told that it might hire off the union

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<sup>4</sup> *Id.* at ¶¶ 9-12 and Attachment 5.

<sup>5</sup> *Id.* at ¶¶ 3, 19 and 20; *Second Affidavit of Grant Lindberg*, at ¶¶ 3, 18 and 19.

<sup>6</sup> *First Affidavit of Grant Lindberg*, at ¶ 20; *Second Affidavit of Grant Lindberg*, at ¶ 19.

<sup>7</sup> *First Affidavit of Grant Lindberg*, at ¶ 21; *Second Affidavit of Grant Lindberg*, at ¶ 20.

<sup>8</sup> *Second Pre-Hearing Order*, OAH Docket Nos. 8-3100-20637-2 and 8-3100-20638-2 (August 17, 2009).

hall hiring list; and that because it was not allowed to hire the four specific electricians it wanted, the school district has not hired any replacement electricians yet.<sup>9</sup>

Petitioners also offer the Affidavit of Robert L. Anschultz who, among other matters, corroborates Mr. Imdieke's version of the effort to rehire electricians following the June 2009 layoffs. Additionally, Mr. Anschultz avers that the District has re-hired skilled craftsmen in all other areas of the Facilities Department with the exception of electricians; and that in 2007, the District attempted to replace a more senior electrician that was an honorably discharged veteran with a less senior non-veteran electrician.<sup>10</sup>

## **MEMORANDUM**

### **I. Petitioners' Motion to Supplement the Record**

Under Rule 1400.6600, a party who wishes to respond to a written motion must file a responsive pleading within 10 business days of receiving the motion. As no objection to the Petitioners' motion was interposed within that period, the motion is granted and the supplementary exhibit is received into the record.

### **II. Respondent's Motions for Summary Disposition**

Summary disposition is the administrative equivalent of summary judgment.<sup>11</sup> Entry of an order for summary disposition is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

The moving party carries the burden of proof and persuasion to establish that there are no genuine issues of material fact which would preclude disposition of the case as a matter of law.<sup>12</sup> Further, when considering a motion for summary disposition, an Administrative Law Judge must view the facts in the light most favorable to the non-moving party.<sup>13</sup> For purposes of the motions by the Minneapolis Public Schools, therefore, all doubts or inferences must be resolved in favor of the non-moving parties – Messrs. Imdieke and Ziebell.

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<sup>9</sup> *Affidavit of Robert J. Imdieke*, at ¶ 3 (August 12, 2009); *see also*, *Affidavit of James N. Ziebell*, at ¶ 4 (August 28, 2009).

<sup>10</sup> *Affidavit of Robert L. Anschultz*, at ¶¶ 3, 7 and 9 (August 12, 2009).

<sup>11</sup> *See*, Minn. R. 1400.5500 (K) (2007); *Tombors v. City of Brooklyn Center*, 611 N.W.2d 24, 26 (Minn. App. 2000).

<sup>12</sup> *See*, *Theile v. Stich*, 425 N.W. 2d 580, 583 (Minn. 1988).

<sup>13</sup> *See, id*, *Ostendorf v. Kenyon*, 347 N.W.2d 834, 836 (Minn. App. 1984).

Both parties agree that the Veterans Preference Act does not serve to shield veterans against removal from jobs that are abolished in good faith, or eliminated through *bona fide* reductions in force.<sup>14</sup> At issue in this case, however, is whether the June 2009 layoffs were a mere pretext, concealing a plan to oust employees who were otherwise protected by the VPA.

Whether a public employer abolished a position in good faith is a question of fact.<sup>15</sup>

For its part, the District asserts that “[t]here are no facts to demonstrate the [District’s] layoff procedure was nothing but open, fair, and free from manipulation.”<sup>16</sup> The Administrative Law Judge disagrees.

The Anschultz, Imdieke and Ziebell affidavits are sufficient to generate a disputed issue of material fact as to the sincerity of the District to separate electricians from service in reverse order of seniority. A fair reading of the affidavits is that the District discharged the electricians in June of 2009, intending to rehire less senior, non-veterans shortly after the layoffs were completed. Accordingly, Petitioners Imdieke and Ziebell are entitled to an evidentiary hearing on their claims that they were separated from service in bad faith.

**E. L. L.**

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<sup>14</sup> See, *Young v. City of Duluth*, 386 N.W.2d 732, 737-38 (Minn. 1986); *State ex rel. Tamminen v. City of Eveleth*, 249 N.W. 184, 186 (Minn. 1933); *Taylor v. City of New London*, 536 N.W.2d 901, 903 (Minn. App.) review denied (Minn. 1995).

<sup>15</sup> See, *Gorecki v. Ramsey County*, 437 N.W.2d 646, 650 (Minn. 1989); *Young*, 386 N.W.2d at 738-739; *Caffrey v. Metropolitan Airports Commission*, 246 N.W.2d 637, 641 (Minn. 1976); *State ex rel. Niemi v. Thomas*, 27 N.W.2d 155, 157 (Minn. 1947).

<sup>16</sup> *Respondent’s Memorandum in Support of Summary Disposition*, at 9.